Perbadanan Perwira Harta Malaysia & Anor v Mohd Baharin bin Hj Abu

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01–2 OF 2007
ZALEHA ZAHARI, AHMAD MAAROP AND SULAIMAN DAUD JJCA
29 JANUARY 2010

Civil Procedure — Declaration — Application for — Employee sought declaration that termination of service was null and void — Whether declaratory relief sought in effect an order of specific performance for reinstatement — Whether declaration could be granted

Civil Procedure — Parties — Proper defendant — Claim by employee for reinstatement of employment — Claim made against subsidiary of company — Separate legal entity — Whether there was cause of action against subsidiary company

Labour Law — Employment — Termination — Employee sought declaration that termination of service was null and void — Whether declaratory relief sought in effect an order of specific performance for reinstatement — Whether declaration could be granted

The second appellant was a body corporate established under s 4 of the Tabung Angkatan Tentera Act 1973 ('Act 101'). In the exercise of the powers conferred on it by s 23(1) of Act 101, the second appellant established the first appellant which is a statutory corporation. The respondent was employed by the first appellant as the maintenance manager with effect from 1 May 1985. The terms and conditions of the respondent's employment with the first appellant were contained in the first appellant's letter dated 28 March 1985 and the 'Skim dan Syarat-syarat Perkhidmatan Perbadanan Perwira Harta Malaysia' (the scheme of service). Pursuant to an investigation on the alleged misconduct of the respondent, the first appellant vide a letter dated 20 February 1997 terminated the respondent's service effective from the date of the letter. The respondent thus filed an action praying for a declaration that the termination of his service was null and void and of no effect or consequence and that he was still an employee of the first appellant, and entitled to seniority and other benefits lawfully due to him; and the consequential orders following the declaration sought. The learned judge allowed the respondent's claim and granted the declaration. Hence this appeal

by the appellants. The first appellant claimed that the declaratory relief sought by the respondent was in effect an order of specific performance for the respondent to be reinstated as an employee of the first appellant. It was further argued that an employer has the power to dismiss its employee in breach of his contract of service without any danger of being compelled to re-employ him and that the only remedy left to the employee is to sue in damages. It was also contended that the court would not order specific performance of contract of service. As regard the second appellant, it was submitted that there was no cause of action against the second appellant because the first appellant and the second appellant were separate legal entities.

Held, allowing the appeal with costs:

(1) It was the first appellant which terminated the employment of the respondent. Although the first appellant was established by the second appellant pursuant to s 23 of Act 101, the former was a separate legal entity from the latter, having the right to sue and be sued. The respondent had no cause of action against the second appellant. It should not have been made a party to this suit. The action as against it should have been dismissed by the learned judge (see para 12).

(2) Although the word 'reinstatement' did not appear anywhere in the respondent's pleading, what in effect was sought by the respondent was reinstatement. The declaration sought by him would therefore inevitably amount to or involve specific performance of his contract of service. He was not entitled to it (see para 14).

(3) The learned judge erred when he allowed the respondent's claim. The respondent could have claimed for wrongful dismissal. But he did not do so. In his statement of claim he pleaded that the termination of his service was null and void and of no consequence and that he was still an employee of the first respondent. His pleaded case was clearly for a declaration that his termination was null and void and that he was praying for reinstatement, not wrongful dismissal pursuant to a breach in his contract of service. For such a pleaded case, he was not without any remedy. He could have filed his case in the Industrial Court pursuant to the Industrial Relations Act 1967. He did not do so (see para 22).

[Bahasa Malaysia summary

Perayu kedua adalah suatu syarikat yang ditubuhkan di bawah s 4 Akta Tabung Angkatan Tentera 1973 ('Akta 101'). Dalam melaksanakan kuasa yang diberikan kepadanya oleh s 23(1) Akta 101, perayu kedua menubuhkan perayu pertama yang merupakan pertubuhan statutori. Responden diambil bekerja oleh perayu pertama sebagai pengurus penyelenggaraan bermula dari

A 1 Mei 1985. Terma-terma dan syarat-syarat pekerjaan responden dengan perayu pertama terkandung di dalam surat perayu pertama bertarikh 28 Mac 1985 dan 'Skim dan Syarat-syarat Perkhidmatan Perbadanan Perwira Harta Malaysia' ('skim perkhidmatan'). Berikutan siasatan atas dakwaan salah laku oleh responden, perayu pertama melalui surat bertarikh 20 Februari 1997
B menamatkan perkhidmatan responden bermula dari tarikh surat tersebut. Responden oleh itu memfailkan tindakan memohon untuk deklarasi bahawa penamatan perkhidmatannya adalah batal dan tidak sah dan tidak mempunyai kesan atau kepentingan dan bahawa dia masih seorang pekerja perayu pertama, dan berhak kepada kekananan dan faedah-faedah lain yang
C dia mempunyai hak secara undang-undang; dan perintah-perintah berikutnya berikutan deklarasi yang dipohon. Maka rayuan ini oleh perayu-perayu. Perayu pertama memohon bahawa relief deklarasi yang dipohon oleh responden adalah sebenarnya suatu perintah pelaksanaan spesifik untuk responden dikembalikan sebagai pekerja perayu pertama.
D Selanjutnya dihujahkan bahawa majikan mempunyai kuasa untuk membuang pekerja atas kemungkiran kontrak pekerjaannya tanpa apa-apa bahaya dipaksa untuk mengambilnya bekerja semula dan bahawa satu-satunya remedi yang tinggal untuk pekerja adalah untuk menyaman untuk ganti rugi. Ia juga dihujahkan bahawa mahkamah tidak akan
E memerintahkan pelaksanaan spesifik bagi kontrak perkhidmatan. Berkenaan dengan responden kedua, adalah dihujahkan bahawa tidak ada kausa tindakan terhadap perayu kedua kerana perayu pertama dan perayu kedua adalah entiti undang-undang yang berasingan.

F **Diputuskan**, membenarkan rayuan perayu dengan kos:

(1) Perayu pertama yang menamatkan pekerjaan responden. Walaupun perayu pertama telah ditubuhkan oleh perayu kedua berikutan s 23 Akta 101, perayu pertama adalah entiti undang-undang yang
G berasingan daripada perayu kedua, yang mempunyai hak untuk menyaman dan disaman. Responden tidak mempunyai kausa tindakan terhadap perayu kedua. Ia tidak sepatutnya dijadikan pihak dalam tindakan ini. Tindakan terhadapnya sewajarnya ditolak oleh hakim yang bijaksana (lihat perenggan 12).

H (2) Walaupun perkataan 'reinstatement' tidak kelihatan di mana-mana di dalam pliding responden, apa yang sebenarnya dipohon oleh responden adalah pengembalian pekerjaan. Deklarasi yang dipohon olehnya adalah dengan itu pasti bermaksud atau melibatkan pelaksanaan
I spesifik kontrak perkhidmatannya. Dia tidak berhak untuk itu (lihat perenggan 14).

(3) Hakim yang bijaksana khilaf apabila beliau membenarkan tuntutan responden. Responden mungkin boleh memohon untuk penamatan salah. Tetapi dia tidak berbuat demikian. Di dalam penyataan

tuntutannya dia memohon bahawa penamatan perkhidmatannya adalah batal dan tidak sah dan tidak memberi kesan dan bahawa dia masih seorang pekerja perayu pertama. Kes yang dirayunya adalah secara jelas untuk deklarasi bahawa penamatannya adalah batal dan tidak sah dan bahawa dia memohon untuk pengembalian pekerjaan. Untuk kes yang dipohon sedemikian, bukanlah tanpa remedi. Dia sepatutnya memfailkan kesnya di Mahkamah Perusahaan berikutan Akta Perhubungan Perusahaan 1967. Dia tidak berbuat demikian (lihat perenggan 22).]

Notes

For cases on application for declaration, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2303–2329.

For cases on parties generally, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4945–5175.

For cases on termination, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1198–1204.

Cases referred to

Aetna Universal Insurance Sdn Bhd v Ooi Meng Sua [2001] 3 MLJ 502; [2001] 3 CLJ 1, CA (refd)

Fadzil bin Mohamed Noor v Universiti Teknologi Malaysia [1981] 2 MLJ 196, FC (refd)

Fung Keong Rubber Manufacturing (M) Sdn Bhd v Lee Eng Kiat & Ors [1981] 1 MLJ 238, FC (refd)

Malloch v Aberdeen Corporation [1971] 2 All ER 1278, HL (distd)

Mohd bin Ahmad v Yang di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor [1997] 2 MLJ 361; [1997] 3 CLJ 135, FC (refd)

Ridge v Baldwin and others [1963] 2 All ER 66, HL (refd)

Rosneli Kundor v Kelantan State Economic Development Corporation [2004] 4 CLJ 492, CA (refd)

Legislation referred to

Education (Scotland) Act 1872 [UK] s 55
Education (Scotland) Act 1962 [UK] ss 1(2), 85(1)
Federal Constitution arts 132, 135
Industrial Relations Act 1967
Lembaga Tabung Angkatan Tentera Order 1984 paras 12(2), 14(a)
Local Government Act 1976 ss 124, 126
Penal Code
Public Authorities Protection Act 1948
Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980
Public Schools (Scotland) Teachers Act 1882 [UK] s 3
Schools (Scotland) Code 1956 [UK] reg 4(2)

Tabung Angkatan Tentera Act 1973 ss 4, 20, 21, 23, 23(1), (2), Third Schedule para 1(f)
Teaching Council (Scotland) Act 1965 [UK]

Appeal from: Suit No S2–21–99 of 1998 (High Court, Kuala Lumpur)

DP Naban (Azam Lim & Pang) for the appellants.
Ram Karpal Singh (Karpal Singh & Co) for the respondent.

Ahmad Maarop JCA:

THE BRIEF FACTS

[1] The brief facts leading to the instant appeal are these. The second appellant is a body corporate established under s 4 of the Tabung Angkatan Tentera Act 1973 (Act 101). In the exercise of the powers conferred on it by s 23(1) of Act 101, vide PU(A) 32/1984, the Lembaga Tabung Angkatan Tentera Order 1984 ('the PPHM Order'), the second appellant established the first appellant which is a statutory corporation. The respondent was employed by the first appellant as the maintenance manager with effect from 1 May 1985. The terms and conditions of the respondent's employment with the first appellant are as contained in the first appellant's letter dated 28 March 1985 and the 'Skim dan Syarat-syarat Perkhidmatan Perbadanan Perwira Harta Malaysia' ('the scheme of service').

[2] Pursuant to an investigation on the alleged misconduct of the respondent, the first appellant issued a letter dated 19 April 1996 asking him to show cause as to why he should not be dismissed on the grounds specified in the said letter. The respondent provided his explanation in his letter dated 6 May 1996. As the first appellant was not satisfied with the respondent's explanation, it set up a panel consisting two of its board members to conduct a disciplinary inquiry. Notice of the inquiry was given to the respondent and he was given the opportunity to be present at the said inquiry and also allowed to bring his witnesses. The respondent attended the inquiry and he was given an opportunity to be heard. Upon completion of the inquiry a report was submitted to the first appellant. Consequently, vide the letter dated 20 February 1997 (termination letter) signed by its chairman, the first appellant terminated the respondent's service effective from the date of the letter. Being dissatisfied with his termination, the respondent filed the writ of summons in the court below praying for a declaration that the termination of his service pursuant to the termination letter was null and void and of no effect or consequence and that he was still an employee of the first appellant, and entitled to seniority and other benefits lawfully due to him; and the consequential orders following the declaration sought.

[3] On 18 December 2006, the learned judge in the court below allowed the respondent's claim and granted the declaration as prayed for by the respondent. Following the declaration, the learned judge also ordered damages to be assessed by the deputy registrar.

[4] Being dissatisfied with the aforesaid decision, the appellants filed an appeal to this court.

THE APPELLANTS' SUBMISSION

[5] The thrust of the submission of learned counsel for the appellants was that the dispute in the instant case was between an employer and an employee over the termination of the latter's contract of employment and that the governing law was the law of contract. Learned counsel for the appellants argued that the declaratory relief sought by the respondent was in effect an order of specific performance for the respondent to be reinstated as an employee of the first appellant. He submitted that it is trite law that an employer is entitled to summarily dismiss his employee at any time, irrespective of any contractual provision requiring the giving of notice of termination. The fact that the dismissal of an employee is not in accordance with the procedure laid down in the contract does not prevent the dismissal from being effective to terminate the contract. It was further argued that the principle is clear that the employer always has the power to dismiss its employee in breach of his contract of service without any danger of being compelled to re-employ him and that the only remedy left to the employee is to sue in damages. It was contended that the court would not order specific performance of contract of service. According to learned counsel, there were two exceptions to the aforesaid principle which were as follows:

(a) a permitted claimant/employee seeking a claim of reinstatement, arrears of wages etc on the ground of unfair dismissed pursuant to the provisions of the Industrial Relations Act 1967; and

(b) the persons holding public offices as provided under art 132 of the Federal Constitution.

[6] The Federal Court decision in *Mohd bin Ahmad v Yang di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor* [1997] 2 MLJ 361; [1997] 3 CLJ 135 was cited in support of the aforesaid submission. It was submitted further that none of the exceptions was applicable to respondent. Therefore, according to learned counsel, the respondent's complaints about the procedural defects of the domestic inquiry undertaken by the first appellant and the first appellant's alleged failure to accord him the right to be heard were irrelevant to the issue before the court. He contended that since the respondent's grounds for attacking the termination of his contract of

employment were procedural defects and the alleged failure to grant him the right to be heard, his action was doomed to fail and ought to be dismissed in limine.

[7] As regard the second appellant, it was submitted that there was no cause of action against the second appellant because the first appellant and the second appellant were separate legal entities, and that the respondent was not an employee of the second appellant but an employee of the first appellant. It was further argued that it was the first appellant that dismissed the respondent.

THE RESPONDENT'S SUBMISSION

[8] The submission of learned counsel for the respondent in substance is as follows. Learned counsel conceded that the equitable remedy of specific performance did not apply in cases concerning pure master servant relationship. However, he argued that the instant case was not such a case as it involved an element of public service and that the employment was supported by statute thereby making it subject to the requirement of natural justice, the non-observance of which, allowed the court to declare the respondent's dismissal null and void. In support of his submission he cited the case of *Malloch v Aberdeen Corporation* [1971] 2 All ER 1278 which was referred to in *Fadzil bin Mohamed Noor v Universiti Teknologi Malaysia* [1981] 2 MLJ 196. In particular learned counsel referred to the following observation of Lord Wilberforce in that case:

> One may accept that if there are relationships in which all requirements of the observance of rules of natural justice are excluded (and I do not wish to assume that this is inevitably so), these must be confined to what have been called 'pure master and servant cases', which I take to mean cases in which there are is no *element of public employment or service*, no *support by statute*, nothing in the nature of an office or a status which is capable of protection. If any of these elements exist, then, in my opinion, whatever the terminology used, and even though in some inter partes aspects the relationship may be called that of master and servant, there may be essential procedural requirements to be observed, and failure to observe them may result in a dismissal being declared void.

[9] Relying on that statement, learned counsel submitted that if the facts of a particular case implied that an employee was a public servant or was supported by statute the status of his employment changed from that of a pure master and servant relationship. This, according to him was another exception in addition to the two explained in *Mohd bin Ahmad*. Reverting to the facts of the instant appeal, learned counsel submitted that the respondent's employment was supported by statute and that he was deemed to be a public servant thereby excluding him from the general master and

servant principle for the following reasons. First, he argued that the respondent was deemed to be a public servant by virtue of s 20 of Act 101. Next he argued that by virtue of s 21 of Act 101, the Public Authorities Protection Act 1948 (Act 148) shall apply to any action, suit, prosecution or proceeding against the *Lembaga*, chairman, any member of the *Lembaga*, the investment panel, officer, servant or agent of the *Lembaga* or corporation established under s 23 of Act 101 and member, officer, servant or agent of such corporation, in respect of any act, neglect or default done or committed by him in such capacity. In other words, the employees of the first appellant were also covered by Act 148. Referring to the long title to Act 148, he submitted that the Act was enacted for the protection of persons acting in the execution of statutory or other public duties. Thirdly, he pointed out that the terms and conditions of service set out in the first appellant scheme of service was made pursuant to s 23 of Act 101. Therefore, he argued that that scheme of service which, among others, set out procedures for termination of service was a product of s 23 of Act 101, and as such the respondent's employment was 'supported by statute'. Thus, he contended that the respondent was entitled to the declaration prayed for in his statement of claim.

ISSUE

[10] The question before us is whether the High Court was right in granting the declaration prayed for by the respondent?

DECISION

The second appellant

[11] The learned judge in the court below did not make any finding on whether the respondent had a cause of action against the second respondent.

[12] The respondent was employed by the first appellant. It was the first appellant which terminated the employment of the respondent. Although the first appellant was established by the second appellant pursuant to s 23 of Act 101, the former was clearly a separate legal entity from the latter, having the right to sue and be sued. In our view the respondent had no cause of action against the second appellant. It should not have been made a party to this suit. The action as against it should have been dismissed by the learned judge in the court below.

The first appellant

[13] Consequent to the case pleaded by him, the respondent prayed for the following declaration:

A declaration the plaintiff's termination of service pursuant to termination letter dated 20 February, 1997 is null and void and no effect or consequence and that the plaintiff is still an employee of the first defendant, a 100% owned subsidiary of the second defendant, the Lembaga Tabung Angkatan Tentera, entitled to seniority and other benefits lawfully due to him.

[14] In our view although the word 'reinstatement' does not appear anywhere in the respondent's pleading, what in effect was sought by the respondent was reinstatement. He wanted to be reinstated to his former post and be entitled to seniority and other benefits lawfully due to him which included salaries and bonus (see *Mohd bin Ahmad*). The declaration sought by him would therefore inevitably amount to or involve specific performance of his contract of service. The question is — was he entitled to it? The answer is in the negative. This is clear from the judgment of the Federal Court in *Mohd bin Ahmad*, where Peh Swee Chin FCJ speaking for the court said:

> A claim by an employee for reinstatement still has that ring of incongruity to make lawyers extremely wary, for they are always acutely aware of the principle that the law will not specifically enforce a contract without any danger of service between master and servant and that the master has always the power to dismiss him in breach of such contract without any danger or being asked or compelled to re-employ him, thus the only remedy left to the servant is to sue in damages. The principle *is that the court will not order specific performance of a contract of personal service*.
>
> *Following the principle aforesaid, (hereafter the said principle), the logical result will be that a dismissed employee cannot claim any declaration that 'his dismissal was void' and if he wants to cast his pleading in the form of a declaration, then he can claim a declaration, eg, he was dismissed in breach of the contract of service and that he claims damages for such breach. To claim that his dismissal was void would indicate that he wants to have his job back. It is therefore understandable and it was quite natural for learned counsel to apply under O 18 r 19 of the Rules of the High Court 1980 to strike out the statement of claim for such reinstatement, with the statement of claim claiming a declaration that 'he is still' market supervisor, with the clearest implication that his earlier dismissal is void or invalid.*
>
> *It appears to us that to the said principle, there are two exceptions.*
>
> *The first exception is a permitted claimant/employee before an Industrial Court, claiming reinstatement, arrears of wages etc on ground of dismissal without just cause or excuse. Such a claimant can present his case after the Minister of Labour decides to refer his case to that court when he thinks fit, see s 20 of the Industrial Relations Act 1967*. The said Act has, of course, statutorily and radically, changed the common law with regard to such permitted claimants/employees for the sake of promoting national economic interest, industrial peace and conferring upon ordinary workman benefits far beyond those that are available in the ordinary court. Apart from the Industrial Relations Act 1967, there may be some other statutes which may modify the said principle, though not quite in a radical way like the said Act. It will be a matter of interpretation of the relevant provisions in such modifying statutes to find out in what precise ways the said principle has been modified.

The second exception is a holder of any public office of certain types. In Malaysia, fortunately for clarity or certainty such public offices as spelt out or set out in art 132 of the Federal Constitution are as follows. They are public offices in the armed forces, the judicial and legal service; the general, public service of Malaysia, the police force; the joint federal and state public services; the education service; and finally the public service of each state. All holders of public offices abovementioned, except the public service of each state, hold office during the pleasure of the Yang di-Pertuan Agong and those who hold office in the public service of each state hold office, on the other hand, during the pleasure of the ruler of the state as the case may be.

Holders of the said public offices enjoy special protection through the Federal Constitution as conferred by its art 135 which provides that, no holder of such office, subject to legislation or subsidiary legislation enacted for carrying out such protection, shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard nor shall be so dismissed or reduced in rank by any authority subordinate to that other authority which has power to appoint him. There are, of course, rules of disciplinary procedure provided for the purpose.

We pause here to emphasise that such protection is special, because, in an ordinary contract of employment or personal service, an employee need not necessarily be given a reasonable opportunity of being heard before such dismissal or reduction in rank because an employee cannot ordinarily in law compel his employer to reinstate him to his former job and therefore exercising a right of being heard is an exercise in futility in so far as it is sought to prevent such dismissal. (Emphasis added.)

[15] Elaborating on the special protection given to the holders of public offices His Lordship said:

We may just as well mention that these public offices are more than just jobs. *The special protection under the modern view is for trying to preserve as far as possible the independence of the holders of these public offices against victimisation by their superior officers or their political masters.* See eg Malaysian Current Law Journal, *Federal Constitution of Malaysia — A Commentary,* (1986 Ed) at pp 394–395. In olden days, such a public office conferring such a status of being protected by law was looked upon as a form of property, and in this connection, we set out below a passage from Professor Wade, *Administrative Law,* (7th Ed) at p 557, dealing with the difference between a public office and a mere job as follows:

A line has to be drawn between an office which gives its holder a status which the law will protect specifically, on the one hand, and, on the other hand, a mere employment under a contract of service. Offices used in old times to be looked upon as a form of property which could be held and recovered in specie: if the holder was wrongfully removed he could obtain restoration by mandamus; or he might be granted prohibition or an injunction. Nowadays he can also obtain a declaration that his removal was void, and that he is therefore still in office, as was done in Ridge v Baldwin, since this remedy likewise operates specifically. In other words, he is removable only by a due and lawful exercise of the power of removal, failing which he remains legally in office. A servant under a mere contract of service enjoys no such

protection, according to a long established rule of law: whatever his contractual rights, he can always be dismissed and his remedy lies in damages for breach of contract. In other words, there is always a power to dismiss him, even though under the contract there is no right to do so. The principle is that one man will not be compelled to employ another against his will.

The special protection given by the Federal Constitution to such holders, is in addition to a protection of the court which requires sufficient compliance, not only with the right to be heard but also with the other rule of natural justice ie the rule against bias. In this connection, we remind ourselves of the statement of the veritably eminent Lord Diplock in *Ong Ah Chuan v Public Prosecutor; Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64 at p 71, that in a constitution based on Westminister model, references to 'law' refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England.

If the dismissal of a holder of such public office is not sufficiently carried out in accordance with the rules of natural justice and the dismissal or disciplinary procedure enacted therefor then the dismissal is ineffective or void. Logically, the post from which he has been purportedly removed remains intact for him and he therefore continues in office. In effect, from his employer's point of view, he is reinstated to his former post. The declarations commonly sought in court in connection with such dismissal are that his dismissal is void, that be continues in office, and he is entitled to arrears of salary, etc. If he succeeds in court with such declarations, he obtains reinstatement, a word which learned counsel in this case and others are wont to shy away as if it were repugnant. We think also that in the case of the holders of these offices, it is perfectly in order. (Emphasis added.)

[16] In that case the Federal Court held that employees of local authorities (under the Local Government Act 1976) were employed purely on contract basis. They were not holders of public offices and were not under any category under art 132 of the Federal Constitution, except any employee in any local authority seconded from the State Government or the Federal Government. The Federal Court also held that the incorporation of the usual General Orders, Chapter D applicable to public officers into the appellant's contract of service, and which was used in dismissing him, did not have the legal effect of making him a holder of any of such public offices as provided under art 132 of the Federal Constitution. Similarly, in *Rosneli Kundor v Kelantan State Economic Development Corporation* [2004] 4 CLJ 492, this court held that the appellant, who was the employee of the respondent (a body incorporated) and holding a permanent and pensionable post, was not a public servant within the meaning of art 132 of the Federal Constitution, and as such she could not seek the protection given under art 135 of the Federal Constitution. Thus, it is clear to us that the second exception explained in *Mohd bin Ahmad* did not apply to the respondent. The first exception obviously did not apply because the respondent did not seek his remedy before the Industrial Court pursuant to the Industrial Relations Act 1967.

[17] This brings us to the third exception (in addition to the two explained in *Mohd bin Ahmad*) which, according to learned counsel of the respondent emanated from *Malloch*. In order to appreciate his submission, it is useful to refer to the facts of that case. In *Malloch*, the appellant was formerly employed by the respondent Scottish education authority as a teacher. On 19 March 1969 the respondents served on the appellant notice of dismissal terminating his employment with them on 24 April 1969. The notice followed a meeting of the respondents' education committee held on 18 March 1969 at which the committee had passed a resolution dismissing the appellant from their employment on the ground that he was unregistered and that his continued employment was no longer lawful by virtue of the Schools (Scotland) Code 1956, as amended, which provided by reg 4(2) that '… every teacher employed by an education authority shall be a (registered) teacher holding the qualifications required by this Code for the post for which he is employed'. The appellant was a certificated teacher and prior to 1965 that was the recognised qualification for appointment to a teaching post by a Scottish education authority. The Teaching Council (Scotland) Act 1965 however established a General Teaching Council for Scotland and provided that it should, inter alia, be the duty of the council to establish a register of persons who were entitled to be registered (certificated teachers were included in that category) and who applied to be registered. The appellant refused to register. The respondents were advised that in view of the appellant's refusal to register, they had no option but to dismiss him since the Secretary of State, in the purported exercise of his powers under s 1(2) of the Education (Scotland) Act 1962 to make regulations prescribing the standards and general requirements 'to which every education authority shall conform' had, in 1967 amended the 1956 Code by substituting the word 'registered' for 'certificated' in reg 4(2). Prior to the meeting of the education committee the appellant had received a notice dated 20 February 1969 informing him of his proposed dismissal. Section 3 of the Public Schools (Scotland) Teachers Act 1882 (substantially re-enacted in s 85(1) of the Education (Scotland) Act 1962) provided, inter alia, that no resolution of a school board for the dismissal of a certificated teacher was to be valid unless notice of the motion for his dismissal should have been sent to the teacher not less than three weeks previous to the meeting; further the resolution for dismissal was not to be valid unless agreed to by a majority of the full members of the board. In the 1882 Act the provisions were preceded by an explanation of their purpose, which was 'to secure that no certificated teacher appointed by and holding office under a school board in Scotland shall be dismissed from such office without due notice to the teacher and due deliberation on the part of the school board. The appellant sought the reduction of the resolution of the education committee and the notice of dismissal on the ground that, contrary to natural justice, the education committee had admittedly refused to receive his written representations or to afford him an opportunity to be heard before the resolution had been passed. The respondents contended: (1) that since, by

A virtue of s 82(1) of the Education (Scotland) Act 1962 (substantially re-enacting s 55 of the Education (Scotland) Act 1872), the appellant's appointment was during the respondents' pleasure, he was not entitled to be heard before being dismissed (prior to 1872 such an office was held ad vitam aut culpam); (2) that, even if in general a teacher had a right to be heard B before being dismissed by an education authority, to have afforded the appellant a hearing would have been a useless formality because whatever he might have said they were legally bound to dismiss him; and (3) that even if the appellant was entitled to a hearing he was not entitled to have their decision to dismiss him reduced or annulled.

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[18] The House of Lords held that had the status of such Scottish teachers been governed purely by common law, a teacher, like the appellant, holding public office during the pleasure of a public authority would not be entitled D to a hearing before being dismissed; the position, however, was different where, as in the appellant's case, the common law position had been fortified by statute and additional protection given. In such a case the court should examine the framework and context of the employment to see whether elementary rights were conferred on the employee either expressly or by E necessary implication. The right of a man to be heard in his own defence was the most elementary protection of all and where a statutory form of protection would be less effective if it did not carry with it the right to be heard, it was not difficult to imply that right.

F **[19]** The House of Lords further held that in the case of the appellant, the implication to be drawn from the requirement in the 1882 Act that three weeks' notice of a meeting to consider a motion for dismissal should be given to a teacher and the prohibition against dismissal without due deliberation was that a teacher was in appropriate circumstances accorded the right to be G heard; the relevant provisions of that Act were only explicable on that basis; there could be no reason for the giving of notice unless it was to afford the teacher an opportunity to prepare his defence, without affording the teacher a hearing a responsible public body could not be said to reach a fair decision. Although the 1882 Act had been repealed and replaced by later Acts, there H was nothing in those subsequent Acts which could reasonably be interpreted as taking away that elementary right.

[20] The observation of Lord Wilberforce (in the passage which was cited by learned counsel for the respondent) that if the element of public I employment or service or 'support by statute' exist in a relationship which may be called that of master and servant, there may be essential procedural requirements to be observed, and failure to observe them may result in the dismissal being declared void, must be considered in the light of its application by His Lordship to the facts in that case. His Lordship observed

that the difficulty in that case lay in the fact that the appellant's appointment was held during pleasure so that he could be dismissed without any reason being assigned. His Lordship referred to *Ridge v Baldwin and others* [1963] 2 All ER 66 at p 71 where Lord Reid said 'It has always been held that such an officer (one holding at pleasure) has no right to be heard before being dismissed'. However, in the case before him, His Lordship found that 'there are other incidents of the employment laid down by statute, or regulation, or code of employment or agreement … So while the courts will necessarily respect the right, for good reasons of public policy, to dismiss without assigned reasons, this should not, prevent them from examining the framework and context of the employment to see whether the elementary rights are conferred on him expressly or by implication, and how far these extend. The present case is, … just such a case where there are strong indications that a right to be heard, in appropriate circumstances, should not be denied'. Considering the history of the legislation affecting the appellant, His Lordship said:

> My noble and learned friend, Lord Reid, has traced the history of legislation in Scotland down to 1908. In my opinion, this shows very clearly that concurrently with the change from an officer ad vitam out culpam to an officer holding at pleasure, *the Legislature intended to preserve the status of the teacher as one holding a public office, only to be dismissed after due process, in 1882 described as the due deliberation by a body of elected members.* If it is pointed out that the words 'holding office' (which were in s 3 of the Public Schools (Scotland) Teachers Act 1882) were dropped in the Education Act of 1946, I can only reply that it would seem to me pitiful if this had the effect, by mere withdrawal of a label, of totally altering the teacher's status and his remedy. Equally, I can draw no conclusion from the use of the words 'master and servant' in certain passages in the judgments in *Morrison v Abernetly School Board*. I do not think that the second division were intending to do more than point out, as the opinions justly do, the ordinary consequence of holding at pleasure, ie that no reasons need be given for dismissal, while at the same time indicating that the schoolmaster was entitled to reasonable notice or compensation in lieu. The Legislature, in 1882, repeated the words 'holding office', thus endorsing or restoring, the position as it existed before *Morrison*'s case. *The significant section now is s 85(1) of the Education (Scotland) Act 1962, which reads:*
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> > (1) *No resolution of an education authority for the dismissal from their service of a certificated teacher* other than a teacher who has completed forty-five years of first class service or of first class service and second class service within the meaning of the Teachers (Superannuation) Regulations *shall be valid unless — (a) written notice of the motion for his dismissal shall, not less than three weeks before the meeting at which the resolution is adopted, have been sent to the teacher and to each member of the education authority; and (b) not less than one half of the members of the education authority are present at the meeting; and (c) the resolution is agreed to by two-thirds of the members so present.*

I ask what purpose the imposition of these requirement could serve, if the teacher had no right in any circumstances to state his case? Why give him three weeks' notice of the motion, to be put to elected members, of whom a two-thirds majority is required, if he can do nothing during the three weeks except wait for the announcement of his fate? How could any responsible body of men reach a fair decision without hearing him? I find the right to be heard in an appropriate situation clearly given by implication.

[21] The unmistakable effect of the relevant legislation in *Malloch* was that no resolution for dismissal of a certificated teacher shall be valid unless the three preconditions provided thereunder were fulfilled. So, clearly in *Malloch*, the appellant was supported (and we venture to say strongly) by legislation emanating from as early as 1882 entrenching the right of a teacher like the appellant to be dismissed only after due process. Hence, the inevitable implication that the right to be heard should not be denied. In our view therefore, to create another possible exception in addition to the two decided in *Mohd bin Ahmad*, there must exist, in support of an employee's employment, a statute of similar nature and effect as that available in *Malloch*. In the instant appeal we find no legislation even close to the legislation before the House of Lords in *Malloch*, in support of the respondent's employment to elevate him to the position where he could ask for a declaration that his termination was null and void and that he be reinstated. The truth is that the facts in *Malloch* and the instant appeal are poles apart. In the instant appeal, the respondent was employed by the first appellant. To reiterate the relevant legal framework, the first appellant was a statutory corporation established by the PPHM Order pursuant to s 23(1) of Act 101. Section 23(2) of Act 101 provides that the provisions of the Third Schedule in the Act shall apply to every corporation established by the second respondent. Paragraph 1(f) of the Third Schedule provides that the second respondent shall, in the order by which a corporation is established, make provision in respect of the terms and conditions of service of officers and servants of the corporation established. In the instant appeal the applicable order is the PPHM Order. Paragraph 12(2) in the PPHM Order confers powers on the first appellant to appoint its officers and servants. The respondent was employed by the first appellant pursuant to that power. Paragraph 14(a) of the PPHM Order provides that the first appellant may, with the approval of the second respondent determine all matters affecting the service of its officers and servants, in particular those relating to dismissal, suspension, reduction in rank and other disciplinary measures. Pursuant thereto, the first appellant made the scheme of service. We have examined Act 101, the PPHM Order, the scheme of service and the first appellant's letter dated 28 March 1985 offering the respondent his employment. We find that none of them contain anything similar to or even close to the relevant legislation in support of the appellant's employment in *Malloch*. We also have not lost sight of the submission of learned counsel for the respondent on ss 20 and 21 of Act 101. Under s 20 of Act 101, all members, officers and servants of the second respondent, the investment

panel and any corporation (one of which is the first appellant), established by the second appellant under s 23 of Act 101, shall be deemed to be public servants within the meaning of the Penal Code. This provision is also commonly available under the legislation establishing statutory bodies, for example s 126 of the Local Government Act 1976. It is for the purpose of prosecution of offences under the Penal Code particularly for offences by, or relating to public servants under the Code. By virtue of s 21 of Act 101, the protection provided under the Public Authorities Protection Act 1948 is made applicable to any action, suit, prosecution or proceeding against, among others, the second appellant and the first appellant as well their members or officers and servants. This is also a standard provision commonly available in other legislation establishing statutory bodies, for example s 124 of the Local Government Act 1976. We do not think that the legislation such as those found under ss 20 and 21 of Act 101 are the kind of legislation which Lord Wilberforce had in mind when His Lordship referred to, 'support by statute'. In our view, in the absence of legislation similar to the one in *Malloch*, s 20 or s 21 in Act 101 singly or taken together is not sufficient to clothe the respondent with the right to ask for a declaration that his dismissal was null and void and of no consequence, and that he should be reinstated. We hasten to add that in *Mohd bin Ahmad*, the Federal Court held that even the incorporation of the General Orders Chapter D, (with all the elaborate procedures relating to disciplinary proceedings including dismissal, which must be complied with including the provision which provided that no officer shall be dismissed or reduced in rank unless he was given the right to be heard), did not have the effect of making the appellant in that case a holder of any such office as categorised under art 132 of the Federal Constitution. We conclude that the exception said to be created in *Malloch* did not apply to the employment of the respondent. His relationship with the first appellant was that of master and servant. The law governing such a relationship is well established. A master is entitled to summarily dismiss his servant at any time, notwithstanding any contractual provision requiring the giving of notice of termination. If a dismissal is challenged, the burden is on the master to justify it. If the master fails to justify the dismissal then he must pay the servant such damages as are just in lieu of proper notice. A master who has given no reason or a bad reason for summarily dismissing his servant may, at the trial of the action, justify the dismissal for a good reason. An express contractual mechanism, in the absence of it forming a comprehensive code for termination, does not oust a party the common law right of repudiation. At common law it is irrelevant that the master has not heard the servant in his defence before terminating his services. What is important is whether the proved or admitted facts disclose a breach of contract; for if they do, the master need not pay damages. A master is entitled to summarily dismiss his servant for misconduct. This is because misconduct goes to the root of the contract and generally has the effect of destroying the relationship of trust and mutual confidence that is essential in a master servant

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relationship (see *Aetna Universal Insurance Sdn Bhd v Ooi Meng Sua* [2001] 3 MLJ 502; [2001] 3 CLJ 1 at pp 5–6).

[22] Thus, for reasons which we have dealt with at length, we hold that the learned judge in the court below erred when he allowed the respondent's claim. The respondent could have claimed for wrongful dismissal. But he did not do so. In his statement of claim he pleaded that the termination of his service was null and void and of no consequence and that he was still an employee of the first respondent. Consequently, he prayed for a declaration in terms of the prayer in his statement of claim. His pleaded case was clearly for a declaration that his termination was null and void and that he was praying for reinstatement, not wrongful dismissal pursuant to a breach in his contract of service. For such a pleaded case, he was not without any remedy. He could have filed his case in the Industrial Court pursuant to the Industrial Relations Act 1967 (see *Mohd bin Ahmad* and *Fung Keong Rubber Manufacturing (M) Sdn Bhd v Lee Eng Kiat & Ors* [1981] 1 MLJ 238 at pp 239–240). He did not do so. In the instant appeal, there is no alternative prayer for damages for wrongful dismissal. The learned judge in the court below allowed the respondent's claim as prayed in his statement of claim and ordered damages to be assessed. Those damages must be in relation to termination of his service which was declared by the learned judge to be null and void.

[23] In the result the appellants' appeal is allowed with costs. The deposit is to be refunded to the appellants. The order of the High Court is set aside.

Appeal allowed with costs.

Reported by Kanesh Sundrum